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the Flow and Underflow of Motl v. Boyd - The Problem

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THE FLOW AND UNDERFLOW OF MOTL V. BOYD
THE PROBLEM

by

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> "We are of the opinion that riparian waters are the waters of the ordinary flow and underflow of the stream; and that the waters of the stream, when they rise above the line of highest ordinary flow, are to be regarded as flood waters or waters to which riparian rights do not attach." ‡

WITH this sentence, Mr. Justice Cureton attempted to establish a certain and definite boundary between the fiercely defensive riparians and the aggressive appropriators. Did he, as some engineers say, over-simplify nature and lay down an impossible and completely unworkable rule? Or did he, like Moses, "lift thou up thy rod, and stretch out thine hand over the sea, and divide it" so that the courts might pass over on dry land?

Much as the subject it discussed, *Motl v. Boyd* has its flow and underflow. It is the purpose of this series of articles to examine and dissect its major conclusions, to appraise them in the light of our present-day knowledge of Spanish and Mexican irrigation law and practice at the time of grant, to re-examine the water rights inherent in Spanish and Mexican grants, to label as such those parts of its conclusions which are dicta, and to determine the areas which are still open for consideration by the legislature and the courts.

Certainly Judge Cureton did not put an end to controversy. In 1927, one year after the decision of *Motl v. Boyd*, a Texas Law

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‡Motl v. Boyd, 116 Tex. 82, 286 S.W. 458, 468 (1926).

Review article asserted that "At present the law is in a very unsatisfactory state" and that the Supreme Court had "muddied the waters."[1] In 1930 a leading article in the Texas Law Review made the statement:

> * * * The existing laws are inexcusably confused and inadequate. Before industry depending upon water can develop with any security a remedy must be had. * * *[2]

Some twenty seven years after *Motl v. Boyd*, Federal District Judge James V. Allred (formerly Attorney General and Governor of Texas) in a memorandum opinion, refusing federal jurisdiction in a water dispute, thus vividly stated his own opinion of the situation:

> For years it has been a matter of common knowledge that the Texas water laws and decisions are in hopeless confusion; that even if they are as clear as some attorneys profess to believe them, their application and administration would be difficult for an agency clothed with ample authority; that the present state laws, which have been on the books without change for decades, confer little, if any, real authority upon the State Board of Engineers; that the Board has granted permits on many streams in the state, very few of which have been cancelled, in such numbers and for such quantities, that if riparian rights are given the full effect for which plaintiffs contend, practically every drop of water, normal flow or flood, is 'bespoken'; that this is practically true in the Rio Grande Valley; that many studies have been made by interim committees of the Texas Legislature, water conservation organizations, etc.; that bills repeatedly have been introduced for a state water code and wound up to await another study; that another such study is now being readied. * * *[3]

One contributing factor to the confusion announced by Judge Allred is the use of common law precedents, born at other times and in other places, where the physical, social, and political factors shaping them were substantially different from those giving rise to current problems in Texas. A second contributing factor is the necessity of meshing the common law with Spanish and Mexican

[1] Hildebrand, *Rights of Riparian Owners at Common Law in Texas*, 6 TEXAS L. REV. 19, 29 (1927).

[2] Cox, *The Texas Board of Water Engineers*, 8 TEXAS L. REV. 238 (1930).

[3] Martinez v. Maverick County Water Control and Improvement District No. 1, now pending as No. 14891 in U.S. Ct. of App., 5th Circuit.

civil law and customs, many of which were actually of Moorish origin.[4]

The English precedents must be read with an understanding that their central problem was the preservation of the stream flow for the purpose of meeting the needs of their mills.[5] Also both English and early American authorities must be studied with the thought always in mind that before the advent of the railroad, the courts conceived of the streams and canals as one of the principal highways of transportation, and, for this purpose, it was necessary to preserve at all times in navigable water courses a minimum depth of water free from obstruction.[6] Even as far back as Magna Charta, we find in the 22nd Chapter: "* * * all weirs from henceforth shall be utterly put down through Thames and Medway, and through all England, except by the sea coasts." Since both England and the eastern half of the United States are normally well watered by rainfall and since there was no cultural tradition for irrigated farming, the courts were not often concerned with the need of water for agricultural purposes.

The common law precedents prior to 1840 were decided under these circumstances, and by judges focusing on these conditions. At about this date there began a rapid process of development of the whole of the western half of the United States, and for the first time the common law of flowing waters was applied to an arid climate. It is common knowledge that this whole territory is radically different in climate and other physical characteristics from that prevailing in England and the eastern half of the United States.[7] But the peoples who migrated west of the Mississippi had lived and been educated in a society of common law traditions. The

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[4] 1 KINNEY, IRRIGATION AND WATER RIGHTS c. 30 (2d ed. 1912).

[5] The following English cases, which include most of the principal ones decided in that country between the dates covered by them, all involved the operation of mills: Omerod v. Todmorden Mill Co., 11 Q.B.D. 155 (1883); Nuttall v. Bracewell, 15 L.T. 313 (Ex. 1866); Chasemore v. Richards, VII H.L. Cas. 349, 11 Eng. Rep. 140 (1859); Miner v. Gilmour, 14 Eng. Rep. 861 (1858); Sampson v. Hoddinott, 1 C.B.N.S. 590, 140 Eng. Rep. 242 (1857); Embrey v. Owen, 6 Ex. 353, 155 Eng. Rep. 579 (1851); Wood v. Waud, 3 Ex. 748 (1849); Howard v. Wright, 57 Eng. Rep. 76 (1823); Bailey v. Shaw, 102 Eng. Rep. 1266 (1805).

[6] Wiel, *Fifty Years of Water Law*, 50 HARV. L. REV. 252, 263 (1936).

[7] *Id.* at 252, 255-7.

lawyers and judges especially had been intensely trained in the common law. Just as a glacier picks up fragmentary debris produced by its grinding action on the terrain over which it expands and carries it hundreds of miles to deposit it eventually on a completely foreign landscape, so did the irresistible westward migration of the English stock bring with it the common law of flowing waters to deposit it on the banks of semi-arid torrential-type streams bearing no resemblance to the Hudson, the Medway, or the Thames. So when water problems arose it was only natural that, lacking familiarity with a system of law which had emerged around the Mediterranean from circumstances, and to fill needs, somewhat similar to those with which they were confronted, they first fell back on the precedents of the system they knew. In some of the states where the contrasts of climate and geography were most pronounced, the utter futility of this approach was soon apparent, but the choice was not so clear in a state such as Texas, which embraces wide variations in rainfall, climate, and topography. Even in Texas, however, it soon became apparent that the common law must be adapted to local geography. In fact it was soon realized that much more needed to be done to the common law system than merely adapt it to geography.[8] Its ingrown technicalities, its division into law and equity, its narrow and restricted pleading and practice did not compare favorably with the civil system. It has been aptly said that:

> The practice under this system (Spanish Civil) appealed to the robust common sense of the early Texas lawyers. The learning of Chitty upon the negative pregnant and the replication *de injuria* were felt to be foreign to the free spirit of the frontier. * * *[9]

So the Texas pioneers proceeded to adopt much of the civil law. They combined law and equity, gave the wife one-half of the fruits of the marriage through community property instead of dower, plead by petition and answer, enforced by sequestration, and exempted a homestead and the tools of trade from liability for

[8] Hall, *An Account of the Adoption of the Common Law by Texas*, 28 TEXAS L. REV. 801, 809 (1950).

[9] McCormick, *The Revival of the Pioneer Spirit in Texas Procedure*, 18 TEXAS L. REV. 426, 428 (1940).

debt.[10] A mingling of the civil and common law was the inevitable product of the freshness of the pioneer approach, for:

> Still another signal character of the pioneers who hewed out our procedure was their willingness to 'try all things.' Theirs was the epoch of trial and error, theirs was the courage to experiment which is the first necessary condition of improvement in any system of procedure. The mingling of the common law ideas which the settlers had brought with them and the civil law conceptions which they were required to accept in the colonial period, and the need for making a practical compromise between the two when independence came promoted the feeling that there was nothing sacred and unchangeable in either system. Like all pioneers, they borrowed many things. As Kipling says of Homer, "What he thought he might require, he went and took."[11]

Although the westward migration had thrust out the Mexican government and much of the civil law, it sheared off and left permanently imbedded in Texas a great host of Spanish and Mexican land titles[12] which, under the treaty of Guadalupe Hidalgo,[13] were required to be recognized as existing property rights[14] The Spanish land grants were made under a land system evolving out of feudalism different from that of the English. In addition, they were controlled by many colonization laws, decrees, and customs. The content of Spanish land titles in the period before 1820 was in many respects unsettled and uncertain and depended in part upon the currents of political movements such as that of the regalists which sought to expand the absolute powers of the crown. From the beginning of the Mexican rebellion until the establishment of the Texas Republic, there existed a period of fluctuating governments

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[10] Hall, *op. cit. supra* note 8, at 801, 809.

[11] McCormick, *op. cit. supra* note 9, at 426, 429.

[12] Spanish and Mexican grants cover 26,280,000 acres in Texas. REP. OF COMM'N OF GEN. LAND OFFICE (1930-1932).

[13] Hoffman, *Texas Land Titles and Vested Rights*, 25 TEXAS L. REV. 508 (1947).

[14] Anderson v. Polk, 117 Tex. 73, 297 S.W. 219 (1927); Manry v. Robison, 122 Tex. 213, 56 S.W. 2d 438 (1932).

and near chaos.[15] During this period a number of Mexican land statutes were passed. Under the Republic of Texas all land grants were in part metamorphized into a modified, common law fee simple estate.[16]

Section 1 of the Schedule of the Constitution of the Republic of Texas provided that "all laws now in force in Texas, and not inconsistent with this Constitution, shall remain in full force until declared void, repealed, altered, or expire by their own limitation."[17] In 1840 the Texas congress decreed "* * * That the Common Law of England (so far as it is not inconsistent with the Constitution or the Acts of Congress now in force) shall, together with such acts be the rule of decision in this Republic, and shall con-

[15] "*Ardrey*, for Plaintiff in error.—The form of government established after the overthrow of the Spanish vice-royalty in Mexico was a limited monarchy, in conformity with the plan of Iguala, and treaty of Cordova, and the Spanish monarchy was provisionally adopted. The executive department of the government was administered by a regency, of which the Generalissimo Don Augustin Iturbide was president. The government went into operation on the 24th of February, 1821. By this revolution and the establishment of a new government, the patrimonial right of the King of Spain passed to the new government. 1 White's Recop. 565. On the 19th of May, 1822, the provisional congress was turned out of doors, and Iturbide was proclaimed emperor of Mexico, and the imperial government continued until the 29th of May, 1823. 1 White's Recop. 570. The instituent congress then provisionally organized a government, and published the same on the 4th of October, 1824. 1 White's Recop. 410. * * *" Goode v. McQueen's Heirs, 3 Tex. 241, (1848).

[16] In Spain so much property had been locked up from commerce by her system of primogeniture and entailments (mayorazgos) that on September 27, 1820, the Cortes passed a decree abolishing all future interests in property. The revolution which resulted in the independence of Mexico was then in progress, but in 1823 Mexico adopted this decree, and in 1834 the state of Coahuila and Texas recognized it as part of its law. It remained the law of Texas until March 20, 1840, on which date the Act of January 20, 1840, adopting the 'common law of England as the rule of decision' when not inconsistent with the Constitution and laws of Texas, became effective. Therefore there was no law of future interests in property in Texas prior to March 20, 1840. Before that time the Congress of the Republic had passed no act under which such interests could have been created. Paragraph 17 of the Declaration of Rights in the Constitution of 1836 is the only constitutional provision that affects the subsequent law of future interests, and that only in so far as it abolished estates tail and in so far as it may affect perpetuities and the Rule against Perpetuities when applied to such interests. This provision, with changes necessarily incident to the change from a republic to a state of the Union, appears as Section 26, Article 1 of the Constitution of 1876, and may be found in all prior constitutions of the State.

* * * By the adoption of the common law as a rule of decision, even though it was to be effective only in so far as it was consistent with the constitution and statutes and what some of the Texas decisions call "the circumstances and conditions of our people,' Texas swung from the extreme of the Spanish decree, destroying all future interests, and took into her legal system the common law of contingent remainders that was developed under and was still controlled by ideas of seisin that were not only never a part of the Texas law, but were foreign to the policy of her law." Rhea, *The Destructibility of Contingent Remainders in Texas*, 2 TEXAS L. REV. 63, 67 (1923).

[17] 1 LAWS OF TEXAS 1077 (Gammel 1898).

tinue in full force until altered or repealed by Congress," and Mexican laws were repealed as of 1840 "* * * except the Laws of the Consultation and Provisional Government, now in force, and except such Laws as related exclusively to grants and the colonization of lands in the State of Coahuila and Texas, and also such Laws as relate to the reservation of Islands and Lands, and also of Salt-Lakes, Licks and Salt Springs, Mines and Minerals of every description; made by the General and State Governments."[18] In this situation, the necessity of defining Spanish and Mexican titles turned the courts toward the civil law[19] in which they had little training and skill.[20] The obvious difficulties in translating into English and Spanish and Mexican laws and commentaries came not only from the fact that they were written in the Spanish language of several different centuries (and therefore some of it even then obsolete in Spain), but also from translating terms from laws and appraising the place of custom[21] in a governmental and legal system so completely alien to ours that legal concepts common to both have many subtle differences.[22] For instance, just who in the vertical heirarchy of continental feudalism had control of water rights on nonnavigable and nonfloatable streams had been in France an uncertain and much debated point.[23] In addition, conitnental Spanish water law and the practice of irrigation in Spain by the complexities of the structure of its monarchy and actually

[18] 2 LAWS OF TEXAS 178 (Gammel 1898).

[19] Act of January 20, 1840, 2 LAWS OF TEXAS 178 (Gammel 1898); Goode v. McQueen's Heirs, 3 Tex. 241 (1848); Sydeck v. Duran, 67 Tex. 256, 3 S.W. 264 (1887); Allen v. West Lumber Co., 244 S.W. 499 (Com. App. 1922); Grubstake Inv. Assn. v. State, 272 S.W. 527 (Tex. Civ. App. 1925); Anderson v. Polk, 117 Tex. 73, 297 S.W. 219 (1927).

[20] "During the period of nominal Mexican rule, these lawyers had drunk, though not deeply, at the spring of the civil law. * * * McCormick, *op. cit. supra* note 9, p. 426, 427.

[21] 1 KINNEY, *op. cit. supra* note 4, c. 30.

[22] "This peculiarity in the federal constitution of Mexico, and the constitution of the state of Coahuila and Texas, has been long known, and in no new discovery of modern research, drawn from the obscurity in which a different language from our own had allowed it to repose. Nearly ten years ago, in a conversation on the subject of the constitution of Mexico, in which a Mexican gentleman, who enjoys considerable reputation among his countrymen as a jurist, participated, he expressed much surprise at what he thought an anomaly in the constitution of Texas, that it was the *faculty of the judiciary to construe, and decide on, the constitutionality of acts of congress.* He was opposed to it in principle, and believed that the constitution of Mexico had wisely guarded against it." Goode v. McQueen's Heirs, 3 Tex. 241, 257 (1848).

[23] Bordeaux, *de la Legislation des Cours d'Eau et des Frais D' Ingenieur* Paris, Alphonse Delhemme, Libraire 80-82 (France 1849).

before 1820 (the period of Spanish grants in Texas) is complicated varied from one section of Spain to another.[24]

The end result of this confusion is sometimes extremely perplexing. For instance, in 1932 the same judge who wrote *Motl v. Boyd* in 1926 wrote the court's opinion in *Manry v. Robinson.*[25] He held that when a river abandons its former course the present owners of Mexican grants riparian to the abandoned river had a right of reverter conditioned on the Mexican law of rivers and thereby acquired title to the river bed at the time the river changed its course. We need not here analyze the correctness of this holding, but a curious blending of common and civil law in the opinion produced the legal oddity of the holder of a Mexican title having, as a part of the original grant from the Mexican government, an appurtenant "right of reverter" to the river bed with the state, as successor to the Mexican government, holding a "base or determinable fee" conditioned on the river not changing its course. Although this case was decided several years after *Motl v. Boyd,* we will quote at length from it in order to give a preview of, and to better illustrate, the problem and the approach to its solution we wish to analyze in *Motl v. Boyd.* The court's reasoning is as follows:

> 1. * * * in determining the rights of holders of title under Mexican grants, the laws of Mexico in effect when the grants were made control. * * *[26]
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> 2. Under the laws of Mexico in effect at the time of these grants, the bed of the Brazos river then occupied by it was the property of the government, and upon the change of sovereignty, became the property of the Republic of Texas. * * *[27]
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> 3. When the river, however, abandoned its channel, the abandoned bed under the laws of Mexico became the property of the owners of the riparian or adjacent lands. * * * The insistence is made that under this act the Mexican civil law, which vested the title to abandoned river beds in the adjacent landowners, was repealed, and that since the river bed in the instant case was not abandoned until 1914, the rule of the common law should apply, and not that of the Mexican civil law. With this view we cannot agree.[28]

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[24] 1 KINNNEY, IRRIGATION AND WATER RIGHTS, 257 (2nd ed. 1912).
[25] Manry v. Robinson, 122 Tex. 213, 56 S.W. 2d 438 (1932).
[26] Manry v. Robinson, 122 Tex. 213, 56 S.W. 2d 438, 442 (1932).
[27] *Ibid.*
[28] *Id.* at 442, 443.

4. These rights thus embraced within the grants were sedulously preseved to the grantees by the Constitution and laws of the Republic of Texas. * * * Can it be doubted that the lands granted to the remote grantors of the respondents *Rosen et al.*, "with all their *uses, customs, privileges and appurtenances,*" are within these protective clauses of the Constitution, and that any act of the Congress of the Republic attempting to deprive the grantees of their lands, or any use, custom, privilege, etc., embraced within their grants, would have been void? We think not. * * *[29]

5. The rights of the Mexican grantees as they existed on March 2, 1836, were likewise preserved to them by the treaty of Guadalupe Hidalgo. Thorpe's American Charters, vol. 1, p. 389. Against the conclusion stated above, it is urged that the right of the riparians to succeed to the title of a river bed upon its abandonment by the river, *was not a property right,* but a *mere rule of law* under which a property right would not vest until the river had actually abandoned its bed; and therefore not within the exceptions to the repealing provisions of the act of 1840 (2 Gammel's Laws p. 178), nor the protective clauses above cited from the Constitutions of the Republic and state. With that insistence we cannot agree. It is true that the avulsive change by which the bed of the river was abandoned did not occur until 1914, but we think the right of the riparians to succeed the state in title to the river bed by reason of such occurrence was a vested one, part of the original grants when they were made by the government of Mexico, just as were the rights to alluvion by accretion and adjacent soil uncovered by reliction.[30]

Having decided that Mexican laws, uses and customs of the time of grant became a part of the grant but recognizing the difficulties of treating the Mexican laws as laws if in fact they had not been repealed, and recognizing that Mexican customs no longer had any force as such, the court attempted to translate the result into an estate in land defined by common law terminology.[31] The court said:

In the instant case, under the civil law, the state, as the successor in title to the Republic of Mexico to the land involved, so long as the Brazos River occupied it, held same under a title within the definition

[29] *Id.* at 443.

[30] *Ibid.*

[31] This is not an altogether new legal problem. For river-bed cases in New York, involving the imposition of the common law upon a Dutch civil law base, see Smith v. Rochester, 92 N. Y. 463 (1883); People v. Canal Appraisers, 33 N. Y. 461 (1865); People v. Page, 56 N. Y. Supp. 834 (1899).

> of a base or determinable fee; that is, its title, while an estate in fee, was in fact a base or qualified one, determinable in favor of the riparians upon the abandonment of the bed by the river. Kent's Commentaries (13th Ed.) Vol. 4, p. 8; Cooley Blackstone (3d Ed.) vol. 1, p. 385; Stephens County v. Mid-Kansas Oil & Gas Co., 113 Tex. 160, 173, 254 S.W. 290, 29 A.L.R. 566.
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> We are therefore of the opinion that the right of the riparians to succeed to the title of the abandoned bed of the river here involved is, and was, a property right, within the exceptions to the repealing act of 1840, and within the protection of the due process clauses of our several Constitutions, and of the provisions of the Treaty of Guadalupe Hidalgo.
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> Under the Mexican civil law, by which we believe we must be governed, the land in controversy does not belong to the state, but to the holders of title under the original Mexican grants. * * *[32]

The effect of such a decision is to freeze into land titles Mexican laws and customs which were themselves subject to amendment and change under the Mexican government. If this transformation is valid, such Mexican laws and customs acquire a stature, under due process far superior to that accorded them in the land of their origin. In this fashion, Judge Cureton poured old Spanish wine into an ancient English bottle and corked it good and tight with American due process.

Therefore, after the passing of the pioneer generation, the question arises whether or not some lawyers and judges, when confronted with a civil law question do not have even less sureness in handling its content than the pioneers had. Lacking a real basis of civil law scholarship upon which to appraise the correctness of their interpretation or any familiarity with the actual practice of civil law upon which to evaluate their sources, and, lacking enough knowledge of comparative law to be able to move freely from one legal system to another, they seem to have lost the freshness of the pioneer search for substance rather than form. It is not surprising to find confusion growing as the years pass.

Out of such a setting, and in 1926, came *Motl v. Boyd.* The case arose from a conflict between upper and lower riparian irriga-

[32] Manry v. Robinson, 122 Tex. 213, 56 S.W. 2d 438, 445 (1932).

tors on a torrential-type stream flowing through land granted after statehood in a semi-arid part of the state.[33] It is without doubt one of the definitive opinions in Texas on the law of flowing waters. That it is the product of much reading is beyond question. That it is a major contribution to the legal literature on the subject is the claim of the ardent riparians. That its major conclusions are debatable is established at each session of the Texas Legislature and at every water meeting. For our purposes, some of the major conclusions discussed in *Motl v. Boyd* may be listed as:

1. All riparian lands in Texas granted prior to 1895, whether from Spain, Mexico, or Texas, carried as a part of the grant a vested property right to the waters of the stream to be used for irrigation.[34]

2. The tile to stream waters is in the State in trust for the public: first, for navigation; second, the riparian waters are in trust for the riparian owners; third, nonriparian waters are in trust for the best interest of all the people. A statutory appropriation grants no property rights in the water but is a mere license to use it for statutory purposes.[35]

3. Riparian righs attach to the ordinary flow and underflow but not to flood waters.[36]

4. An oral, gratuitous permission to construct a dam and irrigation

[33] A fuller statement of the facts is: in 1886 one Nasworthy owned a farm, riparian to Spring Creek, a navigable stream. In that year one Lackey contracted to buy the farm if he could arrange for water to irrigate it. This arrangement was made by Lackey with one Lee who owned 160 acres, patented by the State to his remote grantor in 1857, lying riparian to Spring Creek some four miles above the first tract. Lee gratuitiously authorized Lackey to construct an impounding dam on his farm and the necessary headgate and irrigation ditch to convey the water to the Lackey farm. This Lackey did and he and his successors in title, the Motls being the last, openly and continuously used the water so impounded to irrigate their farm for a period of 35 years. Spring Creek carried storm waters and near continuous flow from springs. The dam impounded both and both were used for irrigation. In 1889 the then irrigator of the Lackey farm filed the affidavit necessary to comply with the Irrigation Act of that year. No issue of any kind arose until the year 1920 when R. W. Boyd and H. C. White purchased the 160-acre tract on which the dam was located. This purchase was made with full knowledge of the presence of the dam and the use being made of it by the Motls. Boyd and White made a preliminary effort to get the permission of the Motls to pump water from the supply behind the dam, which effort was not followed through, and sought from, and were denied by, the Board of Waters Engineers permission to appropriate "Storm" waters from the same source. They then installed a pump and began drawing water from behind the dam to irrigate portions of their 160 acres. The Motls sought and obtained a temporary injunction against them and on a failure of the court to dissolve on motion, Boyd and White appealed. The Court of Civil Appeals reversed the trial court and a writ of error was granted by the Supreme Court. *Motl v. Boyd*, 116 Tex. 82, 286 S.W. 458 (1926).

[34] 286 S.W. at 467.

[35] 286 S.W. at 468.

[36] *Ibid.*

> ditch upon upper riparian land in order to supply water to a lower riparian, plus thirty years open and continuous use and maintenance of such dam and ditch estopped the upper riparian from questioning the right to continue such practices and in effect constituted a grant by the upper to the lower riparian.[37]

These conclusions fall far short of settling all the controversies which arise between riparians and appropriators. With them, especially numbers one and four, we shall deal extensively in subsequent papers. Before doing so, however, it is believed that it will be helpful to further develop the legal and factual background materials. In attempting a survey of water cases and statutes, one will find at once that, though there may be an acute shortage of water, there is no shortage of controversy about water law. Before proceeding far, the most perplexing and puzzling legal dilemmas will beset him.

The charge has often been made that it is neither the lack of water nor the lack of capital which holds back the development of irrigation as a standard farming procedure, but the lack of workable and intelligent laws.[38] But the formulation of workable laws is made difficult by many factors in addition to the common law-civil law problem hereinabove discussed. Consider first the hydrological cycle.

Water gains height when the sun's energy causes the ocean to vaporize and ascend to form a cloud. That part which upon condensation falls to the earth flows back under the pull of gravity

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[37] 286 S.W. at 476.

[38] "Yet, at first blush, strangely the problem was not one of engineering nor yet one of money—but one of law. Local regulations of voluntary mining districts that might do for miners could not suffice. The first task was the legal delimination of rights in water and legal protection, and more encouragement of user of water. California muffed the issue, and for seventy odd years has been playing hide and seek through many-paged reports to the utter mystification of the legal profession, the paralyzation of agriculture and the discouragement of the farmer." Lasky, *From Prior Appropriation to Economic Distribution of Water by the State—via Irrigation Administration*, 1 ROCKY MT. L. REV. 161, 164 (1929); Mead, IRRIGATION INSTITUTIONS, *vi* (1910); Hall, IRRIGATION DEVELOPMENT, 5ff (1886); "* * * It is not surprising that, in this growth, the rate of physical construction exceeded the rate at which we have developed the governmental policies and the public agencies for the control of our water projects. Engineers have met the problems of design and construction, larger and larger sources of finances have become available, but a clear picture of the objectives the water projects are to serve and how such objectives can best be achieved is still lacking." Harding, *Background of California Water and Power Problems*, 38 CALIF. L. REV. 547f (1950).

toward the ocean, losing *head*[39] (or height) as it goes. The name given to this great round trip is the hydrological cycle. It is one of nature's many circulatory systems. It might be called a continental blood stream in that its failure brings death and the desert, its excesses produce floods and disaster, while its smooth and even flow both sustains life, and, again like a blood stream, carries away refuse. A continuing flow sustains the bacterial action by which a stream cleanses itself and the watershed which it drains. Stagnation brings ill health and may bring eventual ruin. This hydrological cycle has been judicially recognized as the life blood of a state.[40] From early times, the prosperity and health of many peoples has depended upon their ability to manage and use the available water supply while at the same time keeping the streams flowing.[41]

Consider next the governmental situation.

In the management of its water supply, each nation has sought a solution consistent with the liberty and freedom it accords to its people. At one extreme might be an absolutist system of total government ownership of all water and complete legislative or administrative control of its distribution. This is characteristic of authoritative states and was attempted in the past by several monarchies in Western Europe. It is difficult for possessory property rights to exist in such states, but, under the absolutist governments of both France and Spain in the period when they may have influenced Texas law, there seems to have been possessory rights originating in royal grant or charter.

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[39] Wiel, *Fifty Years of Water Law*, 80 HARV. L. REV. 252, 261 (1936).

[40] *Gin S. Chow v. City of Santa Barbara*, 22 P. 2d 5 (Cal. 1933).

[41] "* * * At the time that Moses appeared to lead the Children of Israel out of bondage from Egypt, it is certain that (irrigation) was known and practiced in that country. And, as one of the inducements for their continuing their journey, it was promised them in the following language: 'For the land, whither thou goest in to possess it, it is not as the land of Egypt, from whence ye came out, where thou sowest thy seed, and wateredst it with thy foot, as a garden of herbs. But the land whither ye go to possess it, is a land of hills and valleys, and drinketh of the rain of heaven.' The watering of the land with the foot undoubtedly referred to some appliance for lifting the water from a stream or well to pour it into the ditches, and a similar contrivance worked by the Fellahin can be found in some parts of Egypt today. It is evident that Moses did not think much of this method of cultivating the land." 1 KINNEY, IRRIGATION AND WATER RIGHTS, 104 (1912). See p. 103 *et seq.*

On the other extreme might be a situation where all flowing water is the subject of individual property rights protected by and bottomed on a due process concept. Although England developed a system in which property rights predominated, yet navigable rivers were administered under the conservancy for centuries,[42] and Parliament seems to have been able legislatively to control the disposition of flowing streams.[43] Under a pure property right system, there can be little governmental control other than that involved in the arbitration of property conflicts. This is usually accomplished in lawsuits between individual property owners. The power of the legislature to control the storage and distribution of water is severely curtailed by the protection given property rights in flowing waters by due process. This system once resulted in an engineer's charge against the courts that "organized selfishness is more potent than unorganized consideration for the public interest."[44] Some of the inherent limitations of an adversary judicial system leaves some basis for the charge. It is certainly true that since the original source of water power is the interplay between the sun's energy and the pull of gravity, and since the entire cycle must be kept in motion to sustain life, most water law problems do have aspects usually referred to in legal writing as public and correlative.[45]

Between these two extremes—pure property right and pure government ownership and administration—lies the solution gen-

[42] COULSON AND FORBES, LAW OF WATERS, (4th Ed. 1924) p. 490.

[43] Proprietors of River Medway v. Romney, 142 Eng. Rep. 226 (1861).

[44] "* * * Organized selfishness is more potent than unorganized consideration for the public interests. The appropriator has been in court in person and by attorney. The rights of the water-user apart from the ditch-owner have seldom been considered. Hence it is coming to be, that rights to running water are ceasing to conform to the requirements of any use, are being separated from any place of diversion or application, and are being bought and sold and leased like land or livestock or any other property." MEAD, IRRIGATION INSTITUTIONS, p. 87 (1910); "* * * Sometimes these lawsuits take the form of injunctions, sometimes equitable actions to determine the respective rights of appropriators or to quiet titles. But whatever their form, they all have one thing in common: they are waged as though the issue were purely a private matter, and the disposal of the rains and snows that make streams were something in which the public has no concern. There is no disinterested or public measurement of the ditches and streams or of the lands irrigated. The testimony submitted is often inaccurate and contradictory, but it is all the judge has on which to base his decree. Even the government, as the owner of large areas of land requiring irrigation, is never a party to these suits, nor is the State, although nothing so vitally concerns the public welfare as the establishment of ownership or control over streams. * * *" MEAD, *Id.* at 80.

[45] *Fifty Years of Water Law*, 50 HARV. L. REV. 252, 274-282 (1936).

erally achieved in modern times by most Western European and North American nations. The property right cases early began to reflect situations where a group of owners entered into an administrative agreement for the purpose of making their property rights effective.[46] Some of our states, principally those in the arid and semi-arid regions of the United States, have moved from property rights toward governmental control, if not outright governmental ownership.[47] This movement brings on an immediate conflict with "due process"[48] and raises very difficult questions[49] of just how far property rights can be impaired without constituting a "taking" requiring payment of compensation.[50] This requires a careful analysis of riparian rights to determine to what extent they are subject to change by legislation.

Of course, the actual system established by any state or nation

[46] "As soon as use of water from a stream approaches the amount of the available supply, a system of administration is required that each user may receive the water to which he is entitled at the time he has need for its use. * * *" Harding, *Background of California Water and Power Problems*, 38 CALIF. L. REV. 545, 554 (1950); Hutchins, *Selected Problems In the Law of Water Rights in the West*, U.S.D.A. MISC. PUB. 418; *Tyler v. Wilkinson*, 24 Fed. Cases 472, 4 Mason 397 (1827).

[47] Mead, *supra* note 38, Hutchins, *supra* note 46, c. 2.

[48] Hutchins, *supra* note 46, at 32.

[49] "* * * State action infringing property rights can be upheld under the Federal Constitution only if its objective is one which can be justified as in the general welfare, and if the action taken has a real and substantial relation to its justifying objective, not amounting to an arbitrary invasion of individual rights. Riparian rights may be divested for public use under this doctrine, and apparent acquiesence to the taking may waive the riparian's right to compensation for the loss. A 'preponderant public interest' will justify even the destruction of individual property without recourse to the doctrine of nuisance, and state action reasonable inuring to the conservation of natural resources does not violate due process. But under the guise of public interest in the conservation of natural resources, a state may not take one individual's property and give it to another." Boone, *Stale Claims in Texas Stream Waters*, 28 TEXAS L. REV. 931, 932 (1950).

[50] "* * * If the sovereign engages in the business of selling land, it should observe honest business principles. On the other hand, these decisions must be read with an awareness that the police power to take property without compensation has in the last several decades undergone great extension. It is not to be doubted, for instance, that cities may by zoning ordinances restrict an area to residential use in spite of the fact that there were no such restrictions when the land was patented. It is believed that any change in the principles of the cases herein discussed will be in the direction of using the police power to cut into rights that are not already clearly established as incorporeal hereditaments. The use of this principle to sustain legislative action may be observed in the cases discussed above dealing with the right of a landowner to protect himself by diverting surface water from flowing onto his land.

"The writer is of the opinion that there should be a limit to the extent to which we rigorously bind ourselves to apply, through the vested rights doctrine, the laws of ancient governments which in some cases may be inapplicable to modern conditions. If this view is accepted, then the increased invocation of the police power in this field will not be undesirable. * * *" HOFFMAN, *Texas Land Titles and Vested Rights*, 25 TEXAS L. REV. 508, 528 (1947).

is a reflection of the balance it strikes between the competing values inherent in the two opposing systems and, like everything else, changes with changing conditions and with the thinking of the people. It is not difficult to trace in some of our western states, originally operating under a pure property right system, the rapid development from completely unsupervised freedom to regulated sharing. The history of these states clearly demonstrates the growth of governmental supervision from a simple recording-of-claims beginning.[51]

As always, property rights serve as both a brake on absolutism and at the same time as an impediment to comprehensive planning and complete engineering efficiency. Since the task of protecting property rights falls on the courts, this impediment-to-planning aspect of property rights in water has emphasized the differences between lawyers and engineers[52] and has often brought on a conflict between water engineers and the courts.[53] Much of the water legislation of the last seventy-five years has been drafted originally by administrators for the express purpose of circumventing lawyers and the courts.[54] In some states the engineers have at least partially succeeded in erecting a barricade between their management of the storage and distribution of water and the court's concern over individual property rights.[55]

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[51] "As interest in water becomes greater, increasing control is necessary. Local bodies are at first charged only with regulatory duties; and adjudication of water rights is possible only in private litigation between contesting parties when controversies become serious. Then centralized control varying in form, develops."
Cox, *The Texas Board of Water Engineers*, 8 TEXAS L. REV. 238, 239 (1930).

[52] "* * * The hope of engineers—a comprehensive, scientific plan of development and conservation, with an adjustment of uses in some order of economic merit unhampered by technical vested rights of little public advantage—is still a pious hope only; but at least a beginning of the passage from the chaos of casual individual initiative and insistent competing claims will soon be made. * * *" Bingham, *Some Suggestions Concerning the California Law of Riparian Rights*, LEGAL ESSAYS.

[53] "* * * It is the concensus of engineering opinion that the law of irrigation has not kept step with the progress made by the irrigator and the engineer through some half century of experience in diverting and applying the waters of the state to beneficial uses. It is intimated, when it is not directly so charged, that the legal profession, with its inherent conservatism, its traditional adherence to precedence, its overemphasis on the sanctity of private porperty rights, its jealousy of interference with individual action, its fear of a socialistic trend in the body politic, has become an obstruction to the scientific solution of some of the problems which must be solved if Colorado's irrigation laws are to permit the potential development of its water supply. And there is some merit in this contention." McHendrie, *The Evolution of the Doctrine of Priority of Water Rights*, 33 COLO. BAR ASS'N, 126 (1901).

[54] Wiel, *Administrative Finality*, 38 HARV. L. REV. 447, 450, 451 (1925).

[55] *Ibid.*

The question of which system provides the greatest social and economic good[56] has been debated in scores of cases and there has long been agitation, especially from engineers, for the curtailment of all property rights in water and substitution of a license system under state control.[57] It has been said that even though the engineers wished to take the water out of the courts and into their hands still "It should not be too much to ask that the efficiency of engineers subordinate itself willingly to the impartiality to which the courts are sworn, and to which no one else is sworn. Knowledge of that impartiality, far more than efficiency, is the cornerstone of public peace and prosperity," and "In another way of saying it, public confidence in justice is better than new investments without it; and a good name is better than great riches."[58]

So consider next the property right situation.

Both legislative and judicial attempts to engraft workable property concepts upon the hydrological cycle have encountered what initially appear to be insuperable difficulties. The first of these is caused by the physical fact that water in its natural state is in constant motion and is not subject to branding or other iden-

[56] Connecticut v. Massachusetts, 282 U.S. 660, 75 Law Ed. 602 (1931); New Jersey v. New York, 283 U.S. 336, 75 Law Ed. 1104 (1931); Kansas v Colorado, 206 U.S. 46, 51 Law Ed. 957 (1907). Some would make the division in terms of "The greatest good to the greatest number," while others would divide water in terms of a balancing of equities. Still others want a basis of seniority and priority of property rights. As one writer states it: "The problem facing the settlers of the West was, simply and shortly, the problem facing water users everywhere throughout the world (except in the few humid regions)—to apply a limited quantity of available water to an unlimited quantity of available land in the hands of a constantly increasing number of people to get the maximum of benefit and good to the maximum of people, the community as a whole." Lasky, *Irrigation Administration*, 1 ROCKY MT. L. REV. 161, 163 (1929). See also Burch, *Conflicting Interests of States Over Interstate Waters*, 10 TENN. L. REV. 267 (1932).

[57] "As the demands upon the water-supply have grown, necessity has led to a gradual decrease in the freedom of the appropriator and an increase in the control exercised by the public authorities. This change has been so gradual that the legislatures of Wyoming and Nebraska have in effect abandoned the doctrine of appropriation, although retaining the word in their statutes. The person wishing to use water must secure a permit from a board of State officials, and the right acquired is not governed by the appropriator's claim, but by the license for the diversion issued by the State authorities. This tendency toward public supervision is manifest in the other arid States, and it seems only a question of time when the doctrine of appropriation will give way to complete public supervision. * * *"

[58] Wiel, *Administrative Finality*, 38 HARV. L. REV. 447, 475, 476 (1925).

tification.[59] The second immediate property-conceptual difficulty comes with the effort to reconcile the conflicting needs for the consumption of water by industry, by agriculture, and by municipalities. All of these in turn have to be reconciled with the need for a continuous stream flow. Then, to complicate the matter, the hydro-electric power projects regulate flow from big reservoirs through their turbines so that peak water flow is at peak power demand. This may fall during a season of little need by water consumers, and conversely a high period of water consumption may come at a low period of power demand. Thus the power company or river authority may be raising the level of its lakes and releasing only a small flow of water at a season when the downstream irrigator is desperate for water, and conversely at another time of the year the power interest may release a large flow when the irrigator has no need at all. And in the last few years the flood control program has raised the necessity for maintaining sufficient empty reservoir capacity to catch and hold temporarily a flood. This causes the release of stored water in order to have empty reservoir capacity, and this may come at a time when there is little need for power and no use for the water. Another complicating factor is the necessity of having sufficient flow at the mouth of a stream to hold back the intrusion of salt water. This problem is especially acute where large cities or industries adversely affected by salt water encroachment are located at the mouth of rivers. It has been aptly said that:

> * * * Every phase of water litigation and water administration is so interlocked with every other phase that no one problem may be

[59] Kansas v. Colorado, 206 U.S. 46; 51 Law Ed. 957 (1907) "* * * In Callis on Sewers,—which has always been held to be a high authority upon these matters,—p. 78 (orig. edit.), the learned author says: 'It may here, as I take it, be moved for an apt question, in whom the property of running waters was; * * * In my conceit, the Civil law makes prettier and neater distinctions of these than our common law doth; for, there it is said that *natural ratione quaedam sunt commuia, ut aer, aqua profluens, mare, et littora maris.* I concur in opinion with them, that the air is common to all; and I hold my former definitions touching the properties of the sea and the sea-shores. But that there should be a property fixed in running waters, I cannot be drawn to that opinion; for, the Civil law saith farther, *quod flumen est ut ad mare tandem perveniat;* for, in my opinion, it should be strange the law of property should be fixed upon such uncertainties as to be altered into *meum, tuum, suum,* before these words can be spoken, and to be changed in every twinkling of an eye, and to be more uncertain in the proprietor than a cameleon of his colours." Medway River Navigation Co. v. Romney, 142 Eng. Rep. 226, 231 (1861); see also Woodbridge, *Rights of States in Natural Resources,* 5 S.C.L.Q. 130 (1952).

> segregated; and any administrative-judicial adjudgment stopping short of an authoriative consideration of all the porblems, factual, legal, and administrative, concerning each system of water supply as a whole, must necessarily be barren of results.[60]

From this it is not hard to foresee the procedural, jurisdictional and property problems in defining, adjudicating, and administering correlative rights and public duties on the course of a long river among such a great variety of conflicting claims and usages. The difficulty in the resolution of these conflicting claims is further aggravated in Texas, and several of the other states of the country, by the necessity of reconciling these claims when presented by adversaries claiming under opposing theories[61] of water rights, namely riparian and appropriative, which, as we shall demonstrate later, are often basically in conflict.[62]

The word *riparian* is a derivative of the Latin word, *ripa*, meaning river bank and is used to encompass all the rights which belong to land adjacent to a stream bank.[63] In general, appropriative rights are possessory property rights not originating in land ownership.

Riparian rights or privileges are universally considered to be a usufruct[64] incident to the title to land lying adjacent to or

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[60] Cox, *The Texas Board of Water Engineers*, 8 TEXAS L. REV. 238, 239 (1930).

[61] While it is perhaps accurate to say that there are only two basic theories involved, there is a third, namely, a reasonable use, which is regarded by some as a variation of the original riparian doctrine but by others as a doctrine sui generis. See Scurlock, *Constitutionality of Water Rights Regulation*, 1 KAN. L. REV. 125, 127 (1953); Kinyon, *What Can a Riparian Do?*, 21 MINN. L. REV. 512 (1937).

[62] "* * * it may be said that the 1928 amendment to the constitution was the culmination of a long struggle between the common law riparian rights philosophy and the miners' custom of appropriation. * * * Where other western states rejected riparian rights, California courts spent many decades trying to reconcile the two conflicting philosophies. * * * " Treadwell, *Developing a New Philosophy of Water Rights*, 38 CALIF. L. REV. 572 (1950). Hildebrand, *Rights of Riparian Owners at Common Law in Texas*, 6 TEXAS L. REV. 19 (1927).

[63] Los Angeles County Flood Control Dist. v. Abbott, 76 P. 2d 188, 191 (1938); Bathgate v. Iovine, 58 Pac. 442, 445 (1899).

[64] It is interesting to note that in the Code Napoleon water rights in streams are under the chapter on Servitudes.

under a water course.[65] Thus the riparian doctrine presupposes a subdivision of the land. It originated in Europe where the land had been subdivided from time immemorial. The running water itself is not, generally speaking, the subject of property,[66] for "The abstraction of a measure of water from a flowing stream today, can give no property in water which may possibly hereafter form part of the stream, but which is now on the mountains. The present reception of light by a window cannot give a prospective property in the light itself, which will pass through the window tomorrow, and which has not yet emanated from the sun."[67]

Appropriative rights are often said to have been introduced into our law by the California Forty-niners,[68] but the claim has also

[65] "Riparian rights arise out of the ownership of land through or by which a stream of water flows, which rights cannot extend beyond the original survey as granted by the government. 2 FARN. ON WATERS, 1572, § 463a; Lux v. Haggin, 69 Cal. 255, 10 Pac. 674; Boehmer v. Big Rock Irr. Dist., 117 Cal. 27, 48 Pac. 908 (1897). The rule is well expressed by this language: 'The most satisfactory rule is that the parcels of land should be regarded as riparian as far as their location with reference to the stream has indicated where their boundary should be fixed, so that all that parcel which is regarded as one tract should be regarded as riparian, leaving the question of the extent of the use which may be made of the water to the rules regulating the relative rights of owners on the stream'. Under this rule the boundary of riparian land is restricted to land the title to which is acquired by one transaction." Watkins Land Co. v. Clements, 98 Tex. 578, 86 S.W. 733, 735. See also, Hutchins, *op. cit. supra* note 46 at p. 27; COULSON AND FORGES, LAW OF WATERS, (4th Ed. 1926) pp. 74, 76; Tyler v. Wilkinson, 4 Mason 397, 24 FED. CASES 472 (1827); one exception is in certain situations which arise from the subdivision of a tract originally riparian where riparian rights are retained in a back tract. See note: 35 CALIF. L. REV. 603 (1947).

[66] Ormerod v. Todmorden Mill Co., 11 Q.B.D. 155 (1883); Embry v. Owen, 6 EX. 369 (1851); 28 HALSBURY, LAWS OF ENGLAND, p. 358.

[67] GALE, ON EASEMENTS 217 (6th Ed.)

[68] Wyoming v. Colorado, 259 U.S. 419, 66 L. ED. 999 (1921); United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 43 L. ED. 1136 (1898); Sturr v. Beck, 133 U.S. 470, 33 L. ED. 761 (1889); Broder v. Natoma Water & Mining Co., 101 U.S. 274, 25 L. ED. 790 (1879); Jennison v. Kirk, 98 U.S. 462, 25 L. ED. 240 (1878); Basey v. Gallagher, 20 Wall 670, 22 L. ED. 452 (1874); Atchison v. Peterson, 20 Wall 507, 22 L. ED. 414 (1874); Lux v. Haggin, 69 Cal. 255, 10 Pac. 674 (1886); Williams v. Morland, 107 ENG. REP. 620 (1824). "There were developed in California several new brands of law designed to meet new conditions, all of an extremely summary character, and in their enforcement attended with considerable mortality. The miners' law and lynch law were supreme in the community, and while they were brief and crude they nevertheless contained the germ and spirit of justice as completely as the more elaborate codes of highly organized society. Here was a virgin country of which the general government was virtually sole proprietor, but the authorities at Washington laid no hand upon those who were ravishing the soil; in fact, they investigated the find, reported its richness and encouraged emigration." Rogers, *The Law of New Conditions*, 24 A.B.A. REP. 383 (1901). See also Wiel, *Fifty Years of Water Law*, 50 HARV. L. REV. 252 (1936); Wiel, WATER RIGHTS IN THE WESTERN STATES, c. 5 (1911); Craig, *Prescriptive Water Rights in California and the Necessity for a Valid Statutory Appropriation*, 42 CALIF. L. REV. 219 (1954).

been made that Colorado and Wyoming originated the doctrine,[69] and the Mormons in Utah early developed a combination administrative and property right irrigation system for delivering water to lands not bordering on a stream.[70] It has been indicated that appropriative rights as we know them originated in the Spanish and Mexican law and particularly the law of the Pueblos.[71] It is also contended that a comparable doctrine emerged very early in the comomn law based upon prescription.[72] Perhaps Blackstone had the correct label for the approriation system when he said that title by occupancy is "the original and only primitive method of acquiring any property at all."[73]

The appropriation doctrine is but another manifestation of the squatter's right spirit of the American pioneer. It is, in fact, but one means of obtaining a conveyance from the government.

There is a split in the development of appropriative rights between California and a number of other western states.[74] The Colorado doctrine emerged denying the existence of riparian

[69] "Finally, be it noted that this study is organized around Colorado and Wyoming as focal points, with assimilations and comparisons from the other states. California, however, is rarely mentioned, and little considered. This has been done because Colorado and Wyoming have been the pathbreakers, and the other states have developed their law as combinations or permutations of the systems of those two states." Lasky, *From Prior Appropriation to Economic Distribution of Water by the State—via Irrigation Administration.* 1 ROCKY MT. L. REV. 161, 163 (1929).

[70] "Thus there was presented in the desert a necessity for the use of water identically the same as that contemporaneously existing on the Pacfic slope. The evolution of the law of waters in both sections occurred simultaneously, but without any mutual assistance. New York and Manilla are not so far removed from each other in communication today as Salt Lake City and the gold diggings were then, and there consequently was no opportunity for an exchange of views or precedents. By that curious coincidence in anthropology which enables us to find in Central Asia implements of stone, the same in form and use as those found in Arizona, thus indicating a similar stage of progress, we find that the condition in Utah spontaneously bred the same legal conception of the right to water that prevailed in California. In both localities the foundation of the right was the application of the water to beneficial uses. While the one winnowed the golden sand, the other winnowed the golden grain. The harvest of gold is nearly gathered; that of the grain and the other products of the soil continues in ever-increasing volume—so that today this new law of waters is invoked almost exclusively by the needs of agriculture." Rogers, *op. cit. supra* note 68, at 386.

[71] 1 KINNEY, IRRIGATION AND WATER RIGHTS, 989-998 (2nd Ed. 1912).

[72] Lux v. Haggin, 69 Cal. 255, 10 Pac. 674 (1886); WIEL, WATER RIGHTS IN THE WESTERN STATES, c. 5 (1911); Craig, *Prescriptive Water Rights in Califonia,* 42 CALIF. L. REV. 219 (1954); Wiel, *Fifty Years of Water Law,* 50 HARV. L. REV. 252 (1936).

[73] 2 BLACKSTONE'S COMMENTARIES 400.

[74] Hutchins, *op. cit. supra* note 46, at 31; Trelease, *Coordination of Riparian and Appropriative Rights to the Use of Water,* 33 TEXAS L. REV. 24 (1954).

rights on the ground that the common law was not applicable "in a dry and thirsty land"[75] because of difference in geography and climate.[76] Under the Colorado doctrine water rights are based upon appropriations and this even though the adjacent land may have been previously granted to private ownership.[77] The right to appropriate water without owning land[78] spread to the other western states and in 1889 the legislature established it in Texas as a second great source of water rights.[79] The right to appropriate water in Texas is not necessarily an incident of land ownership.[80] In Texas, just as in California, the statutory provisions for appropriation did not displace the riparian doctrine but was superimposed upon it.

The appropriation doctrine might be said to put a premium upon arriving early upon a pioneer landscape, but so did the original granting of riparian land, and for most of the present

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[75] Yunkers v. Nichols, 1 Colo. 551, 553 (1872).

[76] Boquillas Land & Cattle Co. v. Curtis, 213 U.S. 338, 53 L. Ed. 822 (1909). "Indeed, in practical operation, it has long since been discovered that in this arid country the rule of the common law is reversed in that here the water is the principal thing and the land the incident." Rogers, *The Law of New Conditions*, 24 A.B.A. Rep. 376, 390 (1901).

[77] Coffin v. Left Hand Ditch Co., 6 Colo. 443, 446-7 (1882); Wiel, *op. cit. supra* note 72, at 252; Hutchins, *op. cit. supra* note 46, at 84-6.

[78] Consider the following criticism of the practice in some western states of not uniting the right to flowing water with some type of land ownership:

"* * * The history of all irrigated countries shows the necessity of uniting with the soil the right to the water which reclaims it. Under our land system the ownership of these joint agents of production is divorced at the outset. Title to water comes from each of the several States. No right to water goes with a land patent. Each arid State has different laws governing water rights, and in only two is there legislation which favors the attachment of these rights to the soil.

"In arid countries water rights are of more importance than land titles. Without water, the land has little value. Wherever water and land are owned apart from each other, there is a tendency to create monopolies in water, and to place the tiller of the soil at the mercy of the owner of the stream. The natural, if not inevitable, result of our land system is to create such separate ownership and such speculative abuses. No industrial problem of the West equals this in importance. * * *"

"* * * No adequate system of irrigation laws, or any enduring prosperity for the people who till the soil, can be built on separate ownership and divided control of land and water. The fundamental condition of success is that these two joint agents of production should be disposed of together, and that with every title to irrigable land should go an interest in the stream which gives it value." Mead, Irrigation Institutions, pp. 22, 23 (1910).

[79] 9 Laws of Texas 1128 (Gammel 1889).

[80] Arts. 7470, 7471, 7473, 7493, Tex. Rev. Civ. Stats. However, an appropriation once established may become a hereditament appurtenant to the land for the benefit of which the appropriation was made. Lakeside Irrigation Co. v. Markham, 116 Tex. 65, 285 S.W. 593 (1926).

generation both types of property in water rights are acquired by assignment or inheritance. The Colorado doctrine is called totalitarian,[81] and it does totally abrogate the riparians. In turn, the riparians are charged with being obstructionists,[82] with substituting accident for rule,[83] of being "vicious" in a semi-arid state which needs to live and grow,[84] and with benefiting most the men, at the junction of the river and the sea.[85] Likewise, it is charged against the appropriator that "The practical application of the doctrine of priority of appropriation is admittedly unscientific and unsound in securing the ultimate objective—to-wit, the greatest beneficial use of a limited resource."[86] And the outright proponents of government ownership and control of all water have long been vigorously criticizing the appropriation doctrine. In 1903, Mead said:

> The whole principle is wrong. It is wrong in principle as well as faulty in procedure. It assumes that the establishment of titles to the snows on the mountains and the rains falling on the public land and the water collected in the lakes and rivers, on the use of which the development of the state in a great measure depends, is a private matter. It ignores public interests in a resource upon which the enduring prosperity of the community must rest. It is like A suing B for control of property which belongs to C. Many able attorneys hold that these decreed rights will in time be held invalid because when they were established the public, the real owner of the property, did not have its day in court.[87]

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[81] Wiel, *Fifty Years of Water Law*, 50 HARV. L. REV. 252, 292 (1936).

[82] "The problem, stated in a broad way, is the desire that the most extensive use practicable be made of the waters of the state. The obstacle in the way is the claim that a riparian owner is entitled to the full flow of the stream past his land, at least so far as it is in any way beneficial to him, no matter how extravagant and wasteful his use or enjoyment of the water may be, and although it may result in a very low duty being achieved by the water before it is ultimately lost in the sea.

"The obstacle, therefore, is not the general existence of riparian rights, but the existence of this particular incident of riparian rights. This distinction is most fundamental and important, because there seems to be no reason or well founded desire of any one to take away, even by condemnation, the amount of water which riparian land reasonably needs for its irrigation by such ordinary means as are customary in the state. To destroy or even condemn such rights would be, first, economically undesirable, and, second, practically impossible. This distinction would be carefully observed * * *." Treadwell, *Modernizing the Water Law*, 17 CALIF. L. REV. 1 (1928).

[83] Boquillas Land & Cattle Co. v. Curtis, 213 U.S. 339, 53 L. Ed. 822, 826 (1908).

[84] Waldo, *Evaluation of California Water Right Law*, 18 So. CALIF. L. REV. 267 (1945).

[85] Note, 23 CALIF. L. REV. 540.

[86] McHendrie, *The Evolution of the Doctrine of Priority of Water Rights*, 33 COLO. BAR ASSN. 129 (1901).

[87] MEAD, IRRIGATION INSTITUTIONS, p. 207 (1903).

Because riparian rights to a continuous flow may be lost by prescription a lower riparian formerly had the duty of initiating action to prevent an upstream unauthorized diversion of the flow, and this even though he had no present use for the water.[88] This gave rise to a "dog-in-the-manger" charge against riparians.[89] A need for a present use of the water has now become a requirement of suit in most states.[90] The "reasonable use"[91] doctrine has been the answer in some states to the "dog-in-the-manger" and "monoply charges.[92] It is said to be a third system.[93] And some think "* * * there now seems to be a tendency among all western states for gradually developing one broad theory of water law directed toward development and beneficial use."[94] This results

[88] Teass, *Water and Water Courses—Riparian Rights—Diversion of Storm or Flood Waters for Use on Nonriparian Land*, 33 VA. L. REV. 223, 236 (1932).

[89] United States v. Gerlack Live Stock., 339 U.S. 739; 70 SUP. CT. REP. 955, 969 (1950); Orr Ewing v. Colguhoun, 2 App. Cas. (1876-77) 839; Wiel, *Fifty Years of Water Law*, 50 HARV. L. REV. 252, 264 (1936).

[90] Hildebrand, *The Rights of Riparians at Common Law in Texas*, 6 TEXAS L. REV. 19, 27 (1927).

[91] United States v. Gerlach Livestock Co., *supra note* 93 at p. 969:

"* * * It is true that commonly riparian possessors have prior rights of use or for the benefit of the riparian lands to which the rights pertain. They are not rights of arbitrary monopoly and do not support an insistence on economic waste. Therefore the extent of the priority of the riparian possessors as against competing subsequent nonriparian rights of use is properly determinable by reference to the possibility of use on or benefit to the riparian lands," Bingham, *The California Law of Riparian Rights.* LEGAL ESSAYS, p. 11.

[92] Treadwell, *Developing a New Philosophy of Water Rights*, 38 CALIF. L. REV. 572 (1950).

[93] Maloney, *The Balance of Convenience Doctrine in the Southeastern States*, 5 S.C.L.Q. 170. See also authorities cited *supra* note 67.

[94] Busby, *American Water Rights Law*, 5 S.C.L.Q. 106, 123 (1952). Probably the most extreme statement of this position to be found is as follows:

"The western states, starting from various starting points, riparian rights or prior-appropriation, with different conceptions of what each meant, plus different views as to original federal or state title, with constantly occurring crosses and grafts, with similar legislative and constitutional provisions meeting different fates and constructions from courts having behind them different water histories and concepts, have arrived at what at first blush appears to be a hodge-podge in their water law. But the hodge-podge, if examined with the proper astigmatic glasses, assumes a definite ordering. All the states are in transition from various forms of extreme individualism and vested property rights of substance in water to the same goal, the economic distribution of state-granted conditional privileges of user. * * *"

"Necessity has led to * * * increase in the control exercised by the public authorities. This change has been so gradual that the legislatures of Wyoming and Nebraska * * * in effect have abandoned the doctrine of prior-appropriation, although retaining the words in their statutes * * *. The right acquired is not governed by the state authorities * * *. Public supervision is manifest in the other arid states and it seems only a question of time when the doctrine of prior-appropriation will give way to complete public supervision." Lasky, *Irrigation Administration*, 1 ROCKY MT. L. REV. 161, 162, 172 (1929).

from recognizing that all property rights are relative and not absolute and that "In the progress of civilization everyone must consider what will be the effect of his act upon his neighbor."[95] It is also said that, "There has never been any essential conflict in the public interest between the use of water on riparian or non-riparian lands. For otherwise equal conditions, each such use has equal public benefits. The opposition to the riparian doctrine, which finally forced its control, was the ability of riparian owners to prevent beneficial uses by others while maintaining wasteful uses themselves."[96]

Of course, this diminishes the *priority* aspect of the various property rights. In 1925 Wiel said:

> Regulation of streams when the users are numerous cannot be made by mechanical division according to past data. It is a matter of adjusting present daily needs of many people to conditions that are constantly changing. The contention for finality in these determinations (administrative hearings) will probably decline as the results are found to fall short of what was promised, because the contention promised too much.
>
> It sought to reduce the matter to the civil engineering ideal of a fixed formula, a course to which the matter is not adaptable. Just as it is said that specialization of living organisms is the first step toward extinction, so it is probably no mistake to say that the movement to restore rigidity to priorities has taken the step that will eventually lessen priority as a controlling factor. The title determinations are after all not an end in themselves, and are only incidental to regulation.[97]

For these and many other reasons, the rationing of the use of water[98] itself and the use of the power which can be generated in the loss of head have been a constant controversy characterized by frequent and bitter litigation.[99]

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[95] Burch, *Conflicting Interests of States over Interstate Waters*, 10 TENN. L. REV. 267, 280 (1932).

[96] Harding, *Background of California Water and Power Problems*, 38 CALIF. L. REV. 547, 553 (1950).

[97] Wiel, *Administrative Finality*, 38 HARV. L. REV. 447, 478 (1925).

[98] Kuder, *Federal and Local Electric Power in the Central Valley—Coordination or Duplication?*, 38 CALIF. L. REV. 638 (1950).

[99] In 1885, Wm. C. Hall, State Engineer of California, began his official report (Irrigation Development) with the following paragraph:

"California has been the scene of an independent development of irrigation practice, laws, and customs. In some respects the outcome has not been satisfactory to her citizens. The irrigation interest has been crowded, and the legislature has been embarrassed by a multitude of perplexing questions and conflicting measures. We have seen much progress; but how much more might there have been had the waters of this state been

The foregoing survey makes it apparent that the complicating factors in the development of an adequate system of water law are many and that the solutions are as diverse as the nature of the interests to be served. It is also apparent that the form of the problem is not a constant one but rather one that changes with the growth of population and the technological and industrial progress of our times. And, finally, it is apparent that it is a problem which has wider implications than those involved in a particular lawsuit and which requires a study and perspective broader than can be had within the limitations imposed by a single lawsuit developed under our technical rules of evidence.

Thus it would seem to follow that an agency exercising control over our water supply needs an informed, statewide perspective. It must be operated within a legal system containing enough flexibility and adaptability to enable it to adjust to, and cope with, the slowly, but always changing, physical, social, and economic base with which it deals. We repeat then that it shall be our purpose later to re-examine the water rights inherent in Spanish and Mexican grants, to label as such that part of the conclusions of *Motl v. Boyd* which are dicta and to determine the areas which are still open for consideration by the legislature and the courts.

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utilized under a wise system from the beginning of her growth. Without doubt thousands of most desirable settlers have been kept away by current reports of water-right and irrigation litigation. Without doubt many millions of capital have been diverted to other channels, which under settled conditions, would have been devoted to the development of local agricultural interests."

He then concluded:

"Varied and many as were the questions thus brought about, they were few and simple as compared to the propositions which were made for their solution." HALL, IRRIGATION DEVELOPMENT, pp. 5-6 (1886).

One response to Hall's report was the abolition of his office by the Legislature in 1889. CALIF. STAT. (1889), p. 328.